84-452

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SUPREME COURT OF THE UNITED STATES

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LARRY WELDON TODD,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

* * * * * * * *

PETITION FOR WRIT OF CERTIORARI

FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * * * * *

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QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE:

Have the district court and the appellate court in the instant case so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision when it is shown by the record of this case that the district court and the appellate court have failed to reasonably construe, failed to give any effect to, or judicially enlarged Acts of Congress, 16 U.S.C. 742j-1(b) and 16 U.S.C. 3371 et seq. which, with proper construction, would exonerate the accused?

QUESTION TWO:

Has the Court of Appeals decided an important federal question in a way in conflict with applicable decisions of this Court when it decided that Petitioner's motion to dismiss indictment, motions for directed verdict, and motion for judgment of acquittal had not raised an issue of ex post facto judicial construction as defined in the opinion of this Court rendered in Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894, thereby becoming in direct conflict therewith?

QUESTION THREE:

Has the Court of Appeals' decision that "Since the claim of an ex post facto violation was not urged in district court, this court may only consider it on appeal if it constituted plain error under Rule 52(b), Fed.R.Cr.P.", decided an important question of federal law which has not been, but should be decided by this Court in that by the rendition of such decision, the appellate court has imposed an impossible and illogical burden upon the accused, by ruling that he should be able to foresee and raise in the trial court an unforeseeable judicial construction?

LIST OF ALL PARTIES

APPELLANT: LARRY WELDON TODD
ATTORNEY: Walter E. Wilson

APPELLANT: JAMES CLYDE SHORT, JR.
ATTORNEY: Bill G. Alexander

APPELLEE: UNITED STATES OF AMERICA
ATTORNEY: Christopher Nuechterlein

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN COURTS BELOW

The following pertinent documents have been reproduced and are set forth in Appendix A.

1. INDEX PAGE 5 from the PROCEEDINGS RECORD

2. ORDER denying Petitioner's Motion for Judgment of Acquittal

3. JUDGMENT AND PROBATION/ COMMITMENT ORDER - October 6, 1983

4. ORDER denying Petitioner's Motion for Reduction of Sentence

5. AMENDED JUDGMENT AND PROBATION/COMMITMENT ORDER - January 13, 1984

6. OPINION of the Court of Appeals

7. ORDER denying Petitioner's Petition for Rehearing and Petition for Rehearing En Banc

STATEMENT OF THE GROUNDS

The Judgment and Probation/Commitment Order rendered by the Honorable Lucius D. Bunton, United States District Judge for the Western District of Texas, Midland-Odessa, Division, was rendered on October 6, 1983, and was amended on January 13, 1984. This documentation is attached hereto as a part of Appendix A.

The Opinion of the Court of Appeals rendered on June 14, 1984, and the Order denying Petitioner's Petition for Rehearing and Petition for Rehearing En Banc, dated August 3, 1984, are also reproduced in Appendix A.

The statements of the grounds on which the jurisdiction of this Court is invoked are as follows:

1. The district court and the appellate court in the instant case have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of

supervision when it is shown by the record of this case that the district court and the appellate court have failed to reasonably construe, failed to give any effect to, or judicially enlarged Acts of Congress, 16 U.S.C. 742j-1(b) and 16 U.S.C. 3371 et seq. which, with proper construction, would exonerate the accused.

2. The Court of Appeals has decided an important federal question in a way in conflict with applicable decisions of this Court when it decided that Petitioner's motion to dismiss indictment, motions for directed verdict, and motion for judgment of acquittal had not raised an issue of ex post facto judicial construction as defined in the opinion of this Court rendered in Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894, and has thereby become in direct conflict therewith.

3. The Court of Appeals' decision that "Since the claim of an ex post facto violation was not urged in district court, this court may only consider it on appeal if it constituted plain error

under Rule 52(b), Fed.R.Cr.P.", has decided an important question of federal law which has not been, but should be decided by this Court in that by the rendition of such decision, the appellate court has imposed an impossible and illogical burden upon the accused, by ruling that he should be able to foresee and raise in the trial court an unforeseeable judicial construction.

STATUTORY PROVISION CONFERRING JURISDICTION

Petitioner invokes the jurisdiction of this Honorable Court pursuant to 28 U.S.C. 1254(1):

> "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . "

CONSTITUTIONAL PROVISIONS AND ALL STATUTES INVOLVED

These citations pertain to all constitutional provisions and statutes involved in this case. The pertinent text is set forth in Appendix B.

> CONSTITUTION OF THE UNITED STATES, ARTICLE 1, SECTION 9, CLAUSE 3.

CONSTITUTION OF THE UNITED STATES, AMENDMENT V.

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV, SECTION 1.

18 UNITED STATES CODE ANNOTATED, SECTION 371.

18 UNITED STATES CODE ANNOTATED, SECTION 43.

16 UNITED STATES CODE ANNOTATED, SECTIONS 3371, 3372, 3373.

16 UNITED STATES CODE ANNOTATED, SECTIONS 742j-1(a) & (b).

FEDERAL RULES OF CRIMINAL PROCEDURE, 18 U.S.C.A. 52.

FEDERAL RULES OF CRIMINAL PROCEDURE, 18 U.S.C.A. 29.

PREAMBLE

LARRY WELDON TODD, Petitioner for writ of certiorari, respectfully prays that this Honorable Supreme Court respond to his plea for justice.

All are taught from childhood to have faith in a judicial system which bases its decisions on logic and that the function of the United States Supreme Court is to uphold the Constitution.

The legal profession and the court system are often criticized by the news media and by laymen because, too often, the rights of an individual are ignored. This situation occurs because of the enormity of the caseload and the inability of the courts to hear each individual case upon a case by case basis. Therefore, the courts are forced to hear only cases involving the masses or touching upon some tremendous social issue. Often there is no one to hear the individual's complaint and his right to be heard is ignored.

This failure of the system to hear the complaints of individual persons creates contempt,

despair, and loss of faith in the judicial system, and makes a mockery of justice.

Again, Petitioner prays that this Honorable Court hear his plea.

Larry Weldon Todd

LARRY WELDON TODD

STATEMENT OF THE CASE

The government indicted and tried LARRY WELDON TODD, hereinafter called TODD, and others for conspiring (under 18 U.S.C. 371) to violate the LACEY ACT AMENDMENTS (16 U.S.C. 3371, et seq.) by engaging in commercial activity dealing in wildlife that had been illegally taken by the use of an airborne helicopter in violation of the AIRBORNE HUNTING ACT, 16 U.S.C. 742j-1.

Prior to trial, TODD filed a motion to dismiss the indictment and during trial filed motions for directed verdict. At the conclusion of the trial and the return of the jury's verdict of guilty, TODD moved for a judgment of acquittal under Rule 29, FRCrP. In each instance, the requested relief was denied. TODD appealed and in the Court of Appeals raised the issue of the ex post facto application of the LACEY ACT and the AIR-BORNE HUNTING ACT as they had been uniquely and unforeseeably construed by the district court.

The record reflects that JAMES CLYDE SHORT, JR., hereinafter called SHORT, helicopter

pilot and co-conspirator, was found by the Court of Appeals to have a valid permit to hunt coyotes from the air. TODD purchased coyote pelts from SHORT to be taken in the future. TODD'S reasonably intelligent construction of the AIRBORNE HUNTING ACT is that 16 U.S.C. 742j-1(a) narrowly and precisely prohibits the hunting of any animal, etc. from an airborne aircraft, while Section (b) narrowly and precisely provides that Section (a) shall NOT apply if such person holds a permit issued by any state, therefore facially declaring that it shall NOT be a crime TO TAKE a deer or any other animal if the taker holds a permit. (All emphasis herein is added unless the contrary is indicated.)

The district court, by denial of TODD'S motion for dismissal of the indictment, denial of his motions for directed verdict, and motion for judgment of acquittal, construed 16 U.S.C. 742j-1 to mean that, regardless of the fact that SHORT had a permit under 16 U.S.C. 742j-1(b), an offer to take someone airborne hunting would be a criminal act. The Court of Appeals for the first

time in the case found SHORT had a permit under Section (b), but gave it no effect except as a basis of SHORT'S guilty knowledge. The LACEY ACT, both before the amendment dated November 16, 1981, and after, narrowly and precisely deals with TAKEN game and further provides that TAKEN game must have been ILLEGALLY TAKEN. Thus, the construction and enlargement by the district court of the LACEY ACT to include wildlife TO BE TAKEN in the future and the Court of Appeals' failure to give any effect to the license or permit of SHORT was complained of in the appellate court as being in violation of the constitutional rights of TODD by failing to give him fair notice of this construction and by becoming thereby ex post facto in violation of the UNITED STATES CONSTITUTION, Article 1, Section 9, Clause 3, the FIFTH AMENDMENT, and the FOURTEENTH AMENDMENT.

The appellate court has ruled that TODD did not raise the ex post facto issue in the district court and that the ex post facto construction issue did not warrant consideration under the plain error

doctrine, Rule 52(b), FRCrP. It thereby ruled that TODD should have foreseen the unforeseeable and imposed upon him an impossible burden.

After the rendition of the Court of Appeals' ruling, Petitioner filed a petition for rehearing in which he again specifically pointed out the errors of construction, the judicial enlargement, and ex post facto application of same, and the exoneration of the accused which should have resulted from the finding of the appeals court of the license or permit held by SHORT. The petition for rehearing was denied.

TODD now appeals to this court praying that this Court will grant the writ of certiorari, reverse the courts below and acquit Petitioner, or remand this cause for further consideration in the appropriate lower court in the light of the decisions of this Court in Bouie and other cases discussed, infra.

ARGUMENT AMPLIFYING REASONS RELIED UPON FOR ALLOWANCE OF WRIT

QUESTIONS ONE AND TWO:

BOTH THE DISTRICT COURT AND COURT OF APPEALS IN THE INSTANT CASE HAVE SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS TO CALL FOR THE SUPERVISION OF THE UNITED STATES SUPREME COURT and BOTH THE DISTRICT COURT AND COURT OF APPEALS HAVE DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888, McBoyle v. United States, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816; United States v. Cardiff, 344 U.S. 174, 176-177, 73 S.Ct. 189, 190, 97 L.Ed. 200, Pierce v. United States, 314 U.S. 306, 311, 62 S.Ct. 237, 239, 86 L.Ed. 226. cf. Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

It is a tenet of our jurisprudence that "criminal statutes which fail to give due notice that an

act has been made criminal before it is done are unconstitutional deprivations of due process of law." Jordan v. DeGeorge, 341 U.S. 223, 230, 71 S.Ct. 703, 707, 95 L.Ed. 886 (1951).

Petitioner contends that both the district court and the appellate court have, WITHOUT FAIR NOTICE, in violation of his right to due process of law as guaranteed him in the Fifth Amendment to the Constitution, judicially enlarged and expanded, retroactively, the clear, precise, and narrow meaning of two statutes: 16 U.S.C. 742j-1 and 16 U.S.C. 3371, et seq. (AIRBORNE HUNTING ACT and LACEY ACT of November 16, 1981, respectively).

The government, in its zeal to obtain a felony conviction of the accused, has successfully urged upon the courts an illogical construction of the two statutes. The government's position is that TODD conspired to violate the LACEY ACT (i.e., to commercially deal in wildlife which was to be TAKEN by illegal means) and that the ILLEGAL TAKING of said wildlife was accomplished by the use of a helicopter piloted by an alleged

co-conspirator, SHORT, contrary to the AIR-BORNE HUNTING ACT. 18 U.S.C. 371 (the conspiracy statute) provides that if two or more persons conspire to commit an offense against the United States and one or more persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than 5 years or both, but if the objective crime of the conspiracy is a misdemeanor, then the punishment shall be for a misdemeanor. As overt acts, the government alleged that TODD issued two checks payable to SHORT and also made some offers to others to go HUNTING. The government's case, for example, did NOT prove that TODD offered to sell anyone any "TAKEN" wildlife or engaged in conduct dealing in "TAKEN" wildlife. Under 16 U.S.C. 3371(i) the term "TAKEN" means CAPTURED, KILLED, or COLLECTED. The evidence was, therefore, insufficient to support a conviction of conspiracy to violate the LACEY ACT. If the conspiracy charged had been to violate the AIRBORNE HUNTING ACT, the evidence was

apparently sufficient to convict TODD of a misdemeanor, ASSUMING that SHORT had no license or permit.

SHORT did not testify and TODD raised the issue of the license or permit held by SHORT to legally take wildlife which had been issued by the State of Texas. The government has conceded and the appellate court has found that SHORT did, in fact, have the required license or permit.[1] Therefore, both the district court and the appellate court have construed the permit section of the statute, 16 U.S.C. 742j-1(b), wherein it states "this section SHALL NOT APPLY if a person holds a license or permit issued by any state . . . " to have no effect whatsoever. (emphasis added) This ruling was first made by the district court in its refusal to grant Petitioner's motions for directed verdict and his motion for judgment of acquittal in which he generally raised the ex post facto issues. The appellate court's

FN1. BEFORE THIS JUDICIAL FINDING OF A DISPUTED FACT ISSUE BY THE COURT OF APPEALS, TODD HAD RAISED THE ISSUE AS AN INSUFFICIENT EVIDENCE POINT.

construction of the statute is found in its ruling that while SHORT held a permit to hunt coyotes, its only effect was to prove the guilty knowledge of SHORT. Neither the trial court nor the appellate court considered the precise and narrow meaning of the permit exception and if it might even apply to the facts of this case. 16 U.S.C. 742j-1(b) clearly and unambiguously grants and gives to the helicopter pilot an unfettered exemption from the sanctions set forth in 742j-1(a). The statute, 16 U.S.C. 742j-1(b) as enacted by Congress, granting the exemption to hunt wildlife while airborne, narrowly, precisely, and specifically provides: "This section [16 U.S.C. 742j-1 (a)] shall NOT apply if such person . . . is operating under a license or permit of, any State . . . " Had Congress intended for the exemption to apply only to wildlife authorized by the license or permit (such as coyotes), it should have so specifically provided in order to put Petitioner on FAIR NOTICE that his contemplated conduct in allegedly offering hunts from the air for other animals was to be illegal. Because Congress did

not specifically provide that it would be illegal TO TAKE from the air, in an airborne aircraft, any other animals, such as deer, when such person had the required license or permit, it must be presumed that such TAKING would be legal. Therefore, because SHORT had the license or permit, which the government conceded and the appellate court found, under a proper construction of said Act there was no CRIME that TODD agreed to commit in violation of 18 U.S.C. 371, of which he has been convicted. Further, there was no illegal game or wildlife to be commercially sold in violation of the LACEY ACT. Therefore, the application by the Court of Appeals of the rule announced in Huff v. United States, 192 F.2d 911 (5th Cir. 1951) and United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), in support of its decision, DOES NOT APPLY as there was no objective crime for the continuing conspiracy to bring to completion.

This Court in Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) has specifically held:

"The basic principle that a criminal statute must give fair warning of the conduct that makes it a crime has often been recognized by this Court. As was said in United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989, 'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed'."

"It is true that in the Connally and Lanzetta cases, and in other typical applications of the principle, the uncertainty as to the statute's prohibition resulted from vague or overbroad language in the statute itself, and the Court concluded that the statute was 'void for vagueness'. The instant case seems distinguishable, since on its face. . (the statute under question). . was admirably narrow and precise; . . . . The thrust of the distinction, however, is to produce a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness' situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by judicial construction."

"There can be no doubt that a deprivation of the right to fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language."

"The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' (citation omitted) must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." (citation omitted)

The construction of the acts in question by the district court and the appellate court was and is clearly in error. Obviously, this construction was not reasonably foreseeable by the appellant or any other reasonably intelligent person, and the denial of his claim of ex post facto relief by the appellate court is in direct conflict with this court's decisions in Bouie, supra; U.S. v. Harris, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954); Lanzetta v. New Jersey, supra; Marks v.United States, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); and Douglas v. Buder, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973).

"(A)n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law such as Art. 1, sec. 10, (in this case Art. 1, sec. 9, cl. 3) of the Constitution forbids. . . If a state legislature is barred by the Ex Post Facto clause from passing such a law, it must follow that the State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." Bouie, supra, at 353, 354, 84 S.Ct. at 1703 and quoted in U. S. v. Brown, 555 F.2d 407, (5th Cir. 1977).

Persons have a right to fair warning of that conduct which will give rise to criminal penalties. That right is protected against judicial action by the Due Process Clause of the Fifth Amendment. Marks v. United States, supra.

CONCLUSION

Therefore, the supervision of this Court is called upon to rectify the clear error of the courts below that departed from the usual and accepted course of judicial proceedings by failing to properly construe the acts in question. Further supervision of the Court is necessary as it relates to the failure of the Court of Appeals to consider the claimed error of the trial court in refusing the motion to dismiss indictment, motions for directed

verdicts, and motion for judgment of acquittal as it relates to the issue of post-trial judicial enlargement or expansion of a narrowly and precisely worded statute. It is submitted that counsel for the accused and the courts were without the necessary guidance because this Court has not ruled on the necessary way or manner of bringing an ex post facto unforeseeable judicial expansion decision of a lower court's construction of a penal statute to the attention of the appellate court.

For this reason, the Court should grant the writ of certiorari and clarify, amplify, and establish the procedural steps to be taken to properly bring before the Court the issue of an unforeseeable ex post facto judicial enlargement question.

ARGUMENT AMPLIFYING REASONS RELIED UPON FOR ALLOWANCE OF WRIT

QUESTION THREE:

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, i.e., THAT A CLAIMED ERROR OF EX POST FACTO JUDICIAL CONSTRUCTION IN VIOLATION OF CONSTITUTIONAL RIGHTS CAN BE CONSIDERED ONLY UNDER THE PLAIN ERROR DOCTRINE AND IF IT IS HARMLESS, DISREGARD IT, WHICH HAS NOT, BUT SHOULD BE, DECIDED BY THE UNITED STATES SUPREME COURT.

In the instant case, the Court of Appeals has decided that TODD, under the logic of Sykes v. United States, 373 F.2d 607, CCA 5, 1966, cert. denied, 87 S.Ct. 1172, in failing to present the ex post facto judicial expansion or enlargement construction question to the trial court, failed to preserve his error and that the appellate court could only consider same under the plain error rule set forth in 52(b) FRCrP, 18 U.S.C. This ruling, in and of itself, violates or is contrary to the reasoning in precedents of this Court as they apparently apply to Bouie-type situations created by an unforeseeable event.

The error committed in this case is so obvious and plain that the Court of Appeals should have noticed it sua sponte. Silber v. U.S., 370 U.S. 717, 8 L.Ed.2d 798, 82 S.Ct. 1287: "While ordinarily we do not take note of errors not called to the attention of the Court of Appeals nor properly raised here, that rule is not without exception. The Court has 'the power to notice a "plain error" though it is not assigned or specified.' United Brotherhood, C.J. v. United States, 330 U.S. 395, 412, 91 L.Ed. 973, 987, 67 S.Ct. 775. 'In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors in which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.' United States v. Atkinson, 297 U.S. 157, 160, 80 L.Ed. 555, 557, 56 S.Ct. 391."

The decision of the Court of Appeals in this case places an impossible burden on the accused to foresee and object to the unforeseeable. In

the Court of Appeals, Petitioner in his motion for rehearing again raised the ex post facto issue and specifically pointed out to the Court that its judicial finding of the fact that SHORT had the required license or permit had exonerated him from guilt. The denial of the motion for rehearing is also complained of in this proceeding. The rulings by the appellate court, in and of themselves, deny Petitioner due process of law in violation of the Fifth Amendment to the Constitution. The decision of the Court of Appeals effectively states that, by not raising the question presented in the trial court below, Petitioner waived the claim of ex post facto judicial construction. This Court has held in Curtis Publishing Co. v. Butts, 388 U.S. 130, 18 L.Ed.2d 1094, 87 S.Ct. 1975 (1967) ". . . It is clear that even constitutional objections may be waived by a failure to raise them at a proper time . . . (citation omitted) but an effective waiver must, as was said in Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1923, 82 L.Ed. 1461 be one of a 'known right or privilege'."

In this case, Petitioner has attempted, with every procedural device within his knowledge and command, to bring to the courts' attention the obvious errors that were being committed. The errors committed by the courts below are certainly substantial and injurious to Petitioner and the courts' rulings on same were, are, and continue to be, erroneous. They are of such a nature as to seriously affect the fairness, integrity, or public reputation of judicial proceedings. The obviously erroneous judicial construction of the two acts in question has been held sufficient to CONVICT TODD of the crime of conspiracy and shall deprive TODD of his liberty for one year and cost him a $10,000 fine. If ever an error was "PLAIN" as set forth in Rule 52(b), FRCrP, 18 U.S.C., and unforeseeable as set forth in Bouie, supra, it is apparent in the instant case and should have been considered under Rule 52(b).

In Chapman v. California, 87 S.Ct. 824, 386 U.S. 18, 17 L.Ed.2d 705 (1967), this Court announced that "there are some constitutional

rights so basic to a fair trial that their infraction can never be treated as harmless error." 87 S.Ct. at 827-828.

CONCLUSION

There are several categories of ex post facto deprivations of constitutional rights generally seen in the case law.[2] The three basic categories are:

1. A statute which punishes as a crime an act previously committed; and

2. Criminal statutes so vague that reasonably intelligent persons would be required to speculate as to their meaning; and

3. Clear, precise, and narrow statutes given an unforeseeable judicial interpretation which expands the statute to punish an act of an accused person.

On the above three categories, much has been decided by this Court concerning the first two. The third category is specifically defined and distinguished in Bouie, supra. This Court has not

FN2. For a detailed categorization, see 16A AmJur2d, §635 at pgs 585-586.

written on the implications of Bouie, supra, and more particularly, has not yet concerned itself with the relationship of this third category of ex post facto deprivation to the plain error rule. As discussed in Wright, Federal Practice and Procedure: Criminal 2d, Sec. 851-856, pgs 294-344, and specifically in Section 855, pg 330, after discussing the types of constitutional violation of rights which the courts have held to require automatic reversal: "In which category other constitutional violations fall cannot be definitely known until the Surpeme Court has spoken about them." This statement also applies to the application of the plain error rule to a Bouie-type ex post facto deprivation of rights -- a "potentially greater" deprivation than that posed by merely vague statutes or post dated ones. FAIR NOTICE is the gravamen of the error. In the face of an unforeseeable, potentially greater deprivation of constitutional rights of the appellant herein, the Court of Appeals has applied the plain error rule as though the Bouie category ex post facto problem were one of the other two categories

wherein it can be said that an accused has had at least some notice that the statute may be applied against him. Here, as in all Bouie situations, the Petitioner had no notice, i.e., the interpretation of a statute against him was unforeseeable, and therefore it is notoriously and monstrously unfair to apply a rule requiring him to preserve error at the trial level in the district court. The Court of Appeals has held that Petitioner must foresee the unforeseeable. With the greatest respect to the Court of Appeals, the lack of guidance from this Court has caused them to apply an illogical and unfair rule to Petitioner, and to do so in a decision which wanders and wallows in superficial phraseology about the plain error rule. The Court of Appeals almost appears to consciously avoid the real questions: Was the trial court's interpretation unforeseeable? If so, how could it be fair to require its urging in the trial court? If not, was the deprivation so great that the question could be raised in the Court of Appeals, and, procedurally, how do you raise the point, if NOT done so in the present case?

The appeal court's decision deals with the first of the three types of ex post facto deprivations which were raised at trial. It is submitted that the Court of Appeals fell into error in attempting to apply those rules set down by this Court to a Bouie situation, wherein those rules are inappropriate and inapplicable. If Bouie were amplified and explained by this Court, at least insofar as is required to set up guidelines for the application of the plain error rule as it relates to unforeseeable, expansive, judicial interpretation of a statute, then the error in this case will be corrected, and perhaps those in the future better avoided.

It is, therefore, respectfully submitted that appropriate guidelines for applying the plain error rule to Bouie ex post facto deprivations be established by this Court.

It is submitted that because of the unforeseeability of the adverse finding inherent in a Bouie situation, the Court of Appeals should first determine whether Bouie applies, i.e., whether the judicial construction is actually unforeseeable.

Then, if not, the plain error rule should be applied as in other cases. If so, then this Court should rule that an accused always be permitted to raise for the first time on appeal an unforeseeable judicial construction. Such a guideline, if applied below, would have freed Petitioner, and if applied henceforth, will help to avoid the illogical and dangerous constitutional deprivations resulting from application of the plain error rule to Bouie situations where it cannot possibly produce a fair result.

It is, therefore, respectfully prayed that this Court decide this important question of federal law which has not been, but should be decided by this Court.

WHEREFORE, Petitioner prays that this Court grant his application for a writ of certiorari; and upon a hearing hereof, the Court reverse the decision of the courts below and acquit Petitioner; OR, in the alternative, that this Court reverse and remand this case to the proper court for further proceedings consistent with this Court's decisions.

Respectfully submitted,

WALTER E. WILSON, Attorney at law
507 North Lee, Odessa, Texas 79761
915/332-8221 Texas Bar No. 21729000
ATTORNEY FOR LARRY WELDON TODD

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 1984, a true and exact copy of the foregoing Petition for Writ of Certiorari on behalf of Larry Weldon Todd, has been mailed to:

Mr. Christopher Nuechterlein, Attorney
Wildlife & Marine Resources Section
Land & Natural Resources Division
U. S. Department of Justice
Room 639, Todd Building
550 - 11th Street, N.W.
Washington, D. C. 20530

WALTER E. WILSON

APPENDIX A

EXCERPT FROM DOCKETING SHEET:

7:CR-83-0021-04
US V BELL ET AL

PROCEEDINGS

PAGE 5

. . . . . .

09/13/83 . . .

31 Motion to dismiss filed (MOT#29) (Counts 1,4) (Filed Motion to dismiss indictment.) (Dkt'd 09/22/83).

. . .

Motion to dismiss denied (MOT#29) (Dkt'd 09/22/83).

09/14/83 . . .

Motion made in open court for judgment of acquittal (MOT#30) (Counts 1,4) (Dkt'd 09/22/83).

Motion for Judgment of acquittal denied (MOT#30) (Dkt'd 09/22/83).

. . . . . .

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA	)	
VS.	)	MO-83-CR-21
LEE MILTON BELL, KARL DOUGLAS BROSIG, JAMES CLYDE SHORT, JR., and LARRY WELDON TODD	)	

ORDER

On this date came on to be considered Defendants' Motion for a Judgment of Acquittal in the above-styled cause, and this Court, after fully considering this Motion, is of the opinion that this motion is without merit.

Accordingly,

IT IS, THEREFORE, ORDERED that Defendant's Motion for a Judgment of Acquittal Notwithstanding the Verdict is DENIED.

SIGNED and ENTERED this the 1st day of October, 1983.

/s/ Lucius D. Bunton
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA vs.
DEFENDANT: LARRY WELDON TODD

Docket No. MO 83 CR 21 (4)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: October 6, 1983

COUNSEL:	WITH COUNSEL, Walter Wilson
PLEA:	NOT GUILTY
FINDING & JUDGMENT:	There being a verdict of guilty by jury trial on September 15, 1983. Defendant has been convicted and charged of the offense(s) of On or about August, 1981 and continuously thereafter up to and including July 26, 1983 defendant committed offenses against the United States in violation of the Lacey Act, 16 USC §3372(a)(1), 3373(1)(B) and the Airborne Hunting Act, 16 USC §741j-1 and 18 U.S.C., §371.
SENTENCE OR PROBATION ORDER:	The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The

defendant is hereby committed to the custoy of the Attorney General or his authorized representative for imprisonment for a period of One (1) year and pay a $10,000 committed fine.

COMMITMENT RECOMMENDATION: The court orders commitment to the custody of the Attorney General and recommends, defendant is to contact the U.S. Marshals Office in Midland, Texas by 10:00 A.M. on October 24, 1983 to ascertain where he is to voluntarily commit himself.

/s/ Lucius D. Bunton
LUCIUS D. BUNTON
October 6, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA

VS. NO. MO-83-CR-21(4)

LARRY WELDON TODD

ORDER

Came on this day for consideration Defendant LARRY WELDON TODD's Motion for Reduction of Sentence, filed pursuant to Rule 35 of the Federal Rules of Criminal Procedure. The Court continues to be of the opinion that the sentence imposed was just and proper under the facts of the case; accordingly,

IT IS ORDERED that Defendant's Motion for Reduction of Sentence be and is hereby DENIED.

In response to Defendant's request for clarification of whether he was sentenced for the commission of a felony or a misdemeanor, the Court hereby informs him that the sentence imposed falls under a felony designation.

SIGNED and ENTERED this 13th day of January, 1984.

/s/ Lucius D. Bunton
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA vs.
DEFENDANT: LARRY WELDON TODD

Docket No. MO 83 CR 21 (4)

AMENDED
JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: October 6, 1983.

COUNSEL:	WITH COUNSEL, Walter Wilson
PLEA:	NOT GUILTY
FINDING & JUDGMENT:	There being a verdict of guilty by jury trial on September 15, 1983. Defendant has been convicted and charged of the offense(s) of on or about August, 1981 and continuously thereafter up to and including July 26, 1983 defendant committed offenses against the United States in violation of the Lacey Act, 16 USC §3372(a)(1), 3373(d)(1)(B) and the Airborne Hunting Act, 16 USC §741j-1 and 18 U.S.C., §371.
SENTENCE OR PROBATION ORDER:	The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The

defendant is hereby committed to the custoy of the Attorney General or his authorized representative for imprisonment for a period of One (1) year and pay a $10,000.00 committed fine.

COMMITMENT RECOMMENDATION: The court orders commitment to the custody of the Attorney General and recommends, defendant is to contact the U.S. Marshals Office in Midland, Texas by 10:00 A.M. on October 24, 1983 to ascertain where he is to voluntarily commit himself.

/s/ Lucius D. Bunton
LUCIUS D. BUNTON
January 13, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1748

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY WELDON TODD and
JAMES CLYDE SHORT, JR.,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas

(June 14, 1984)

Before GOLDBERG, RUBIN and REAVLEY, Circuit Judges.

REAVLEY, Circuit Judge:

Larry Todd and James Short appeal their convictions for conspiracy, in violation of 18 U.S.C. § 371 (1976), to violate the Lacey Act, 16 U.S.C. §§ 3372(a)(1), 3373(d)(1)B) (Supp. 1981), which prohibits the sale of wildlife taken or possessed in violation of federal law -- here, The Airborne Hunting Act, 16 U.S.C. 742j-1 (1976). Short appeals his convictions for substantive violations of the Lacey Act and the Bald Eagle Protection

Act, 16 U.S.C. § 668(a) (1976). Both appellants challenge the sufficiency of the evidence and contend that their convictions under the Lacey Act violated the constitutional prohibition of ex post facto laws since the alleged conspiracy began prior to amendments to the Act enhancing the penalties for its violation. We affirm the decision of the district judge except as to Short's substantive violation of the Lacey Act in Count II of the indictment.

I.

Todd, a gunshop owner, offered hunters a package arrangement for airborne hunts of wildlife. The package included a guaranteed, trophy-size animal, transportation by helicopter, a guide (Short), use of guns provided by Todd, and services of a taxidermist. The cost of a hunt ranged from $1,000 to $5,000, depending on the type and number of game animals sought.

One hunter testified that on January 22, 1982, he went on a hunt with Short, killing a barbado sheep, for which pleasure he paid $600. Another hunter on the same trip admitted killing a young

eagle, either golden or bald, a mule deer, and a javelina. Because these animals were not trophy-size he was not required to pay a fee for the hunt but agreed to pay $250 for expenses. A gun belonging to Todd was used on the hunt. Both hunters testified on behalf of the government in exchange for reduced sentences for violations of the Lacey and Airborne Hunting Acts.

On April 1, 1982, Todd offered an airborne hunt for elk, mule deer, and antelope to another hunter. This conversation was captured on tape and played to the jury. There was evidence of other offers of hunts. In October or November 1981, for example, Todd offered a hunter an airborne hunt of whitetail deer, mule deer, big horn sheep, and possibly mountain lion or cougar for a price of $2,000. These events may have occurred prior to the November 16, 1981 effective date of the amendments to the Lacey Act enhancing the penalties for its violation. See 16 U.S.C. § 3373.

Todd and Short were each convicted of conspiracy to violate the Lacey Act and sentenced to

one year imprisonment and a $10,000 committed fine. Short was convicted of a substantive violation of the Lacey Act, for which he received a sentence of six months imprisonment, to run consecutively to the sentence for conspiracy, and a $5,000 fine; he was also convicted of violating the Bald Eagle Protection Act, for which he received a suspended sentence of one year imprisonment.

II.

Todd and Short argue that their convictions under the Lacey Act violated the constitutional prohibition against ex post facto laws, U.S. Const., art. I, § 9, cl. 3, and the Due Process Clause of the Fifth Amendment. The conspiracy began prior to November 16, 1981, the effective date of the amendments enhancing the penalties for violation of the Lacey Act. 16 U.S.C. § 3373. Appellants maintain that their convictions were void since the agreement to violate the Act antedated the amendments. We disagree.

The former version of the Lacey Act, which dates back to 1900, made illegal the transportation, receipt, acquisition, or purchase of wild mammals

or birds "killed, taken, purchased, sold or otherwise possessed in any manner contrary to any Act of Congress . . . State [law] . . . or foreign [law]." 18 U.S.C. § 43, amended by 16 U.S.C. §§ 3371, 3372, 3373 (Supp. V 1981). The act imposed a penalty of not more than a $500 fine or six months imprisonment. Id. The 1981 amendments proscribed essentially the same conduct as the prior version, 16 U.S.C. §§ 3372(a)(1), (2), but enhanced the penalty for violations. 16 U.S.C. § 3373. For knowing violations in which the market value of the animals killed exceeded $350, the amendments imposed a penalty not to exceed a $20,000 fine or five years imprisonment. 16 U.S.C. § 3373(d)(1). For knowing violations involving animals with a market value less than $350, the amendments imposed a maximum penalty of a $10,000 fine and one year imprisonment. Id. § 3373(d)(2).

The ex post facto clause applies to any law that imposes punishment for an act which was not criminal at the time it was committed or that aggravates a crime making it greater than it was

when it was committed. See Marks v. United States, 430 U.S. 188, 192, 97 S.Ct. 990, 993 (1977); United States v. Mann, 517 F.2d 259, 269 (5th cir. 1975), cert. denied, 423 U.S. 1087 (1976). Since the amendments to the Act enhance the penalty for its violation, prosecution of acts occurring prior to its effective date under the new felony provisions would violate the ex post facto prohibition.

Since the claim of an ex post facto violation was not urged in district court, this court may only consider it on appeal if it constituted plain error under Rule 52(b), Fed. R. Cr. P. Sykes v. United States, 373 F. 2d 607, 612 (5th Cir. 1966), cert. denied, 386 U.S. 977 (1967). Plain error is that which is "so obvious that failure to notice it would 'seriously affect the fairness, integrity, or public reputation of the judicial proceedings.' " United States v. Brown, 634 F.2d 819, 829 (5th Cir. 1981), quoting United States v. Musquiz, 445 F.2d 963, 966 (5th Cir. 1971); 3A C. Wright, Federal Practice and Procedure § 856 at 340 (1982). Whether an appellate

court should take notice of error not raised in the district court must be determined on the basis of the facts of the particular case. United States v. Jones, 673 F.2d 115, 119, (5th Cir. 1982); 3A C. Wright, supra.

The specific error complained of here is that the district judge failed to give proper instructions to the jury regarding the dates of the alleged acts constituting the conspiracy, so that the jury considered evidence of hunts or offers of hunts occurring prior to the 1981 amendments in reaching a guilty verdict. This court addressed a similar question in United States v. Brown, 555 F.2d 407 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978). There, several police officers were accused of racketeering and conspiracy to violate the racketeering act in a scheme spanning a period of two decades. The scheme involved numerous individuals and many of the acts took place prior to the effective date of the Organized Crime Control Act of 1970, which made racketeering illegal. The district judge did not advise the jury of the effective date of the act or that it

must find evidence of a conspiracy of which the accused was a member after the effective date of the Act. Thus, the appellants were indicted and tried for conduct which occurred prior to the enactment of the statute which made it unlawful. This court therefore found the convictions constitutionally defective.

In Brown the conspiracy provisions of the act were applied retroactively in the indictment and in the jury instructions, thereby allowing appellants to be convicted for acts that were innocent before the law was passed. Id. at 420. By contrast, the indictment in the case before us alleges only two overt acts by the appellants that occurred prior to the effective date of the Lacey Act amendments; all of the other acts occurred during the effective period of the amendments.[1] Most of

[1] The indictment alleges the following overt acts. Only items (b) and (e) occurred prior to the effective date of the Act.

a. The Acts described on Count II through IV of this indictment are incorporated herin by reference, and constitute overt acts.

b. In or about November 1981 LARRY WELDON TODD, defendant, issued a check for

the evidence focused on events that occurred within the effective date of the amendments. The record includes a tape recording of Todd making an offer of an airborne hunt in April 1982. Witnesses testified that Short took them on an airborne hunt in January 1982. Unlike Brown the record here clearly establishes violations of the amended act by the appellants during the relevant time period. In light of this evidence we cannot

> $9,000 to JAMES CLYDE SHORT, JR., defendant.
>
> c. In or about December 1981 LARRY WELDON TODD, defendant, issued a check for $15,000 to JAMES CLYDE SHORT, JR., defendant.
>
> d. In or about April 1982 LARRY WELDON TODD, defendant, offered to Bruce Young an airborne hunting trip for $2500 and $3000.
>
> e. In or about October 1981 LARRY WELDON TODD, defendent, offered Brooks Harmon, Jr., an airborne hunting trip for several thousand dollars.
>
> f. In or about November 1981 KARL DOUGLAS BROSIG, defendant, had a conversation with Jerry Taylor.
>
> g. During the period of this conspiracy KARL DOUGLAS BROSIG, defendant, did taxidermy work on game animals killed by the individuals.

say that failure to give the jury instruction was so deficient as to result in the likelihood of a grave miscarriage of justice or circumstances that seriously affect the fairness, integrity, or public reputation of judicial proceedings. See United States v. Jones, 673 F.2d at 119.

Furthermore, a conspiracy is a continuing crime; it is not completed at the time the agreement was entered. 18 U.S.C. § 371 (1976); Huff v. United States, 192 F.2d 911, 914-15 (5th Cir. 1951). We have held that "where a crime is still being carried on and continued after the date when the act becomes effective," a statute imposing a greater penalty for conspiracy does not violate the constitutional prohibition of ex post facto laws. Huff, 192 F.2d at 915. Accord United States v. Campanale, 518 F.2d 352, 365 (9th Cir. 1975). In this case the conspiracy clearly continued past the effective date of the amendments enhancing the penalty.

III.

Todd and Short also claim that the evidence is insufficient to sustain their convictions under any

of the counts in the indictment. "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc).

A.

Both Todd and Short contend that the evidence is insufficient to establish a conspiracy. To prove a conspiracy, the government must show beyond a reasonable doubt that a conspiracy existed, that the appellants had knowledge of it, and that with this knowledge they voluntarily became a part of it. United States v. Bankston, 603 F.2d 528, 531 (5th Cir. 1979). In this case the testimony of witnesses who participated in the conspiracy provided direct evidence of its existence. The government produced a taped telephone conversation in which Todd offered to provide an airborne hunt of wildlife. Witnesses testified that Short conducted a hunt in January 1982. Jurors could

have reasonably inferred that the use of Todd's gun on the hunt conducted by Short in January provided evidence of a conspiracy between the two. They may reasonably have inferred that Short was the guide who conducted the hunts offered by Todd. We hold that there was sufficient evidence to support the jury finding of guilty as to the conspiracy charge.

B.

Todd and Short also contend that the government failed to establish the two essential elements of the Lacey Act: (1) that they knowingly promoted airborne hunts of wildlife, and (2) that the wildlife had a market value in excess of $350. To warrant felony punishment the government must prove that each appellant knew that wildlife with a market value of $350 was taken in violation of state or federal law. 16 U.S.C. § 3373(d)(1)(B). The government need not prove that the appellants knew of the existence of the Lacey Act itself, only that they knew of the illegal nature of the game. S. Rep. No. 123, 97th Cong., 1st Sess. 11, reprinted in 1981 U.S. Code Cong. &

Admin. News 1748, 1758. Todd testified that he knew that hunting from a helicopter was a violation of federal law. Short's knowledge may be inferred from the totality of the circumstances of the case. See United States v. Fonseca, 490 F.2d 464, 470 n.5 (5th Cir.), cert. denied, 419 U.S. 1072 (1974). Short had a permit to hunt coyotes from the air and had extensive experience as a hunter. From these facts the jury could reasonably have inferred that Short was aware that hunting animals from an aircraft violated federal law. We see no deficiency in the proof of this element.

C.

The appellants also contend that the government failed to establish that the game taken had a market value in excess of $350. On the January 1982 hunt one hunter paid a fee of $600 and killed a barbado sheep, which does not qualify as wildlife under Texas law, see Tex. Parks & Wild. Code § 63.001 (Vernon 1976), and therefore does not constitute a violation of the Lacey Act. See 16 U.S.C. § 3372(a). The other hunter paid only

$250 to cover the expenses of the hunt since the eagle, deer, and javelina were not of sufficient size to qualify as trophies under the terms of the guaranty. Appellants therefore maintain that the $350 market value was not established.

We have no difficulty with the convictions for conspiracy to violate the Lacey Act. Under the conspiracy charge the government is only required to prove that at least one overt act was taken by one of the conspirators in futherance of the conspiracy; it need not prove that the substantive offense was consummated. United States v. Jacobs, 451 F.2d 530, 539-40 (5th Cir. 1971), cert. denied, 405 U.S. 905 (1972). Both Todd and Short offered airborne hunts of wildlife at prices ranging from $1,000 to $5,000. A commercial arrangement whereby a professional guide offers his services to obtain wildlife illegally is an offer to sell wildlife. S. Rep. No. 123, 97th Cong., 1st Sess. 12, reprinted in 1981 U.S. Code Cong. & Admin. News at 1759. The best indication of the value of the game "sold" in this manner is the price of the hunt. The evidence thus estab-

lishes that the appellants conspired to take game with a market value exceeding $350.

D.

Short was convicted of a substantive violation of the Lacey Act. To establish such a violation, the government must prove that the market value of the animals taken exceeded $350. 16 U.S.C. § 3373(d)(1). The only evidence the government offered as to the actual value of the game taken was the price of $1,200 quoted in the offer by Short and the $250 amount actually paid for the hunt by the hunter who killed the wildlife. The government argues that this proof is adequate to support the conviction inasmuch as one hunter paid $600 for the hunt, even though he did not kill wildlife; and the hunt was part of a commercial operation, the target of the felony provision of the Act. See S. Rep. No. 123, 97th Cong., 1st Sess. 11, reprinted in 1981 U.S. Code Cong. & Admin. News at 1759.

We cannot agree. It is true that, had one of the animals been large enough to mount as a trophy, the proof would have supported a value

of $1,200. Nonetheless, the statute requires proof of the value of the wildlife actually taken.[2] The government offered no evidence that the value of the dead eagle, deer, or javelina exceeded $350. Consequently, we hold that the evidence was insufficient to support Short's conviction under the substantive violation of the Lacey Act. That conviction is reversed.

IV.

We affirm the conviction of Larry Todd on count I of the indictment and affirm the conviction of James Short on Counts I and III. The government failed to prove a felony violation of the Lacey

[2] Criminal Penalties

(1) Any person who --

. . . .

(B) violates any provision of this chapter (other than section 3372(b) of this title) by knowingly engaging in conduct that involves the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants with a market value in excess of $350,

knowing that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation, shall be fined not more than $20,000 or imprisoned for not more than five years or both.

Act against James Short under count II. Double jeopardy bars his retrial. Burks v. United States, 437 U.S. 1, 10-11, 98 S.Ct. 2141, 2147 (1978). The sentences imposed on Short are vacated and we remand the case for resentencing of Short on counts I and III of the indictment. The district court, upon resentencing, may impose no more than a maximum sentence of one year and six months imprisonment, together with no greater than $15,000 fine.

AFFIRMED as to Larry Weldon Todd; AFFIRMED IN PART and REVERSED IN PART as to James Clyde Short, Jr. and REMANDED FOR RESENTENCING.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1748

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY WELDON TODD and
JAMES CLYDE SHORT, JR.,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas

ON PETITIONS FOR REHEARING AND
SUGGESTIONS FOR REHEARING EN BANC

(Opinion 06/14/84, 5Cir., 198___, _____F.2d___)
(August 3, 1984)

Before GOLDBERG, RUBIN and REAVLEY,
Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

APPENDIX B

UNITED STATES CODE ANNOTATED,
CONSTITUTION OF THE UNITED STATES,
Article 1, Section 9, Clause 3.

Bill of attainer and ex post facto laws

No Bill of Attainer or ex post facto Law shall be passed.

UNITED STATES CODE ANNOTATED,
CONSTITUTION OF THE UNITED STATES,
AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeoparty of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE ANNOTATED,
CONSTITUTION OF THE UNITED STATES,
AMENDMENT XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 UNITED STATES CODE ANNOTATED, Section 371.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c.645, 62 Stat. 701.

18 UNITED STATES CODE ANNOTATED, Section 43.

(a) Any person who--

(1) delivers, carries, transports, or ships, by any means whatever, or causes to be delivered, carried, transported, or shipped for commercial or noncommercial purposes or sells or causes to be sold any wildlife taken, transported, or sold in any manner in violation of any Act of Congress or regulation issued thereunder, or

(2) delivers, carries, transports, or ships, by any means whatever or causes to be delivered, carried, transported, or shipped for commercial or noncommercial purposes or sells or causes to be sold in interstate or foreign commerce any wildlife taken, transported, or

sold in any manner in violation of any law or regulation of any State or foreign country; or

(b) Any person who-

(1) sells or causes to be sold any products manufactured, made, or processed from any wildlife taken, transported, or sold in any manner in violation of any Act of Congress or regulation issued thereunder, or

(2) sells or causes to be sold in interstate or foreign commerce any products manufactured, made, or processed from any wildlife taken, transported, or sold in any manner in violation of any law or regulation of a State or a foreign country, or

(3) having purchased or received wildlife imported from any foreign country or shipped, transported, or carried in interstate commerce, makes or causes to be made any false record, account, label, or identification thereof, or

(4) receives, acquires, or purchases for commercial or noncommercial purposes any wildlife--

(A) taken, transported, or sold in violation of any law or regulation of any State or foreign country and delivered, carried, transported, or shipped by any means or method in interstate or foreign commerce, or

(B) taken, transported, or sold in violation of any Act of Congress or regulation issued thereunder, or

(5) imports from Mexico to any State, or exports from any State to Mexico, any game mammal, dead or alive, or part or product thereof, except under permit or other authorization of the Secretary or, in accordance with any regulations prescribed by him, having due regard to the requirements of the Migratory

Birds and Game Mammals Treaty with Mexico and the laws of the United States forbidding importation of certain live mammals injurious to agriculture and horticulture;

shall be subject to the penalties prescribed in subsections (c) and (d) of this section.

(c)(1) Any person who knowingly violates, or who, in the exercise of due care, should know that he is violating, any provision of subsection (a) or (b) of this section may be assessed a civil penalty by the Secretary of not more than $5,000 for each such violation. Each violation shall be a separate offense. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed under this paragraph, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found or resides or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. In hearing such action, the court shall have authority to review the violation and assessment of the civil penalty de novo.

(2) Any employee authorized by the Secretary to enforce the provisions of this section, or any officer of the customs, shall have authority to execute any warrant to search for and seize any wildlife, product, property, or item used or possessed in violation of this section with respect to which a civil penalty may be assessed pursuant to paragraph (1) of this subsection. Such wildlife, product, property, or item so seized shall be held by such employee pending disposition of proceedings by the Secretary involving the assessment of a civil penalty pursuant to paragraph (1) of this subsection; except that the Secretary may, in lieu of holding such wildlife, product, property, or item, permit such person to post a bond

or other security satisfactory to the Secretary. Upon the assessment of a civil penalty pursuant to paragraph (1) of this subsection for any non-willful violation of this section, such wildlife, product, property, or item so seized may be proceeded against in any court of competent jurisdiction and forfeited to the Secretary for disposition by him in such manner as he deems appropriate. The owner or consignee of any such wildlife, product, property, or item so seized shall, as soon as practicable following such seizure, be notified of that fact in accordance with regulations established by the Secretary or the Secretary of the Treasurer. Whenever any wildlife, product, property, or item is seized pursuant to this subsection, the Secretary shall move to dispose of the civil penalty proceedings pursuant to paragraph (1) of this subsection as expeditiously as possible. If, with respect to any such wildlife, product, property, or item so seized, no action is commenced in any court of competent jurisdiction to obtain the forfeiture of such wildlife, product, property, or item within thirty days following the disposition of proceedings involving the assessment of a civil penalty, such wildlife, product, property, or item shall be immediately returned to the owner or the consignee in accordance with regulations promulgated by the Secretary.

(d) Any person who knowingly and willfully violates any provision of subsection (a) or (b) of this section shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

(e) Any wildlife or products thereof seized in connection with any knowing and willful violation of this section with respect to which a penalty may be imposed pursuant to subsection (d) shall, upon conviction of such violation, be forfeited to the Secretary to be disposed of by him in such manner as he deems appropriate. Any other property or item so seized may upon conviction, in the discretion of the court, be

forfeited to the United States or otherwise disposed of. The owner or consignee of any such wildlife, product, property, or item so seized shall, as soon as practicable following such seizure, be notified of that fact in accordance with regulations established by the Secretary or the Secretary of the Treasury. If no conviction results from any such alleged violation, such wildlife, product, property or item so seized in connection therewith shall be immediately returned to the owner or consignee in accordance with regulations promulgated by the Secretary, unless the Secretary, within thirty days following the final disposition of the case involving such violation, commences proceedings under subsection (c) of this section.

(f) For the purpose of this section, the term--

(1) "Secretary" means the Secretary of the Interior;

(2) "person" means any individual, firm, corporation, association, or partnership;

(3) "wildlife" means any wild mammal, wild bird, amphibian, reptile, mollusk, or crustacean, or any part, egg, or offspring thereof, or the dead body or parts thereof, but does not include migratory birds for which protection is afforded under the Migratory Bird Treaty Act, as amended;

(4) "State" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Guam; and

(5) "taken" means captured, killed, collected, or otherwise possessed.

As amended Dec. 5, 1969, Pub.L. 91-135, § 7(a), 83 Stat. 279.

16 UNITED STATES CODE ANNOTATED,
Sections 3371, 3372, 3373

Section 3371. Definitions

For the purposes of this chapter:

(a) The term "fish or wildlife" means any wild animal, whether alive or dead, including without limitation any wild mammal, bird, reptile, amphibian, fish, mollusk, crustacean, arthropod, coelenterate, or other invertebrate, whether or not bred, hatched, or born in captivity, and includes any part, product, egg, or offspring thereof.

(b) The term "import" means to land on, bring into, or introduce into any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

(c) The term "Indian tribal law" means any regulation of, or other rule of conduct enforceable by, any Indian tribe, band, or group but only to the extent that the regulation or rule applies within Indian country as defined in section 1151 of Title 18.

(d) The terms "law," "treaty," "regulation," and "Indian tribal law" mean laws, treaties, regulations or Indian tribal laws which regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants.

(e) The term "person" includes any individual, partnership, association, corporation, trust, or any officer, employee, agent, department, or instrumentality of the Federal Government or of any State or political subdivision thereof, or any other entity subject to the jurisdiction of the United States.

(f) The terms "plant" and "plants" mean any wild member of the plant kingdom, including roots, seeds, and other parts thereof (but excluding common food crops and cultivars) which is indigenous to any State and which is either (A) listed on an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, or (B) listed pursuant to any State law that provides for the conservation of species threatened with extinction.

(g) The term "Secretary" means, except as otherwise provided in this chapter, the Secretary of the Interior or the Secretary of Commerce, as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970 (84 Stat. 2090); except that with respect to the provisions of this chapter which pertain to the importation or exportation of plants the term means the Secretary of Agriculture.

(h) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, Northern Mariana Islands, American Samoa, and any other territory, commonwealth, or possession of the United States.

(i) The term "taken" means captured, killed, or collected.

(j) The term "transport" means to move, convey, carry, or ship by any means, or to deliver or receive for the purpose of movement, conveyance, carriage, or shipment.

(Pub.L. 97-79, § 2, Nov. 16, 1981, 95 Stat. 1073.)

Section 3372. Prohibited acts

(a) Offenses other than marking offenses

It is unlawful for any person-

(1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken or possessed in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;

(2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce-

(A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law, or

(B) any plant taken, possessed, transported, or sold in violation of any law or regulation of any State;

(3) within the special maritime and territorial jurisdiction of the United States (as defined in section 7 of Title 18)-

(A) to possess any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law or Indian tribal law, or

(B) to possess any plant taken, possessed, transported, or sold in violation of any law or regulation of any State;

(4) having imported, exported, transported, sold, purchased, or received any fish or wildlife or plant imported from any foreign country or transported in interstate or foreign commerce, to make or submit any false record, account, label, or identification thereof; or

(5) to attempt to commit any act described in paragraphs (1) through (4).

(a) Marking offenses

It is unlawful for any person to import, export, or transport in interstate commerce any container or package containing any fish or wildlife unless the container or package has previously been plainly marked, labeled, or tagged in accordance with the regulations issued pursuant to paragraph (2) of section 3376(a) of this title.

(Pub.L. 97-79, § 3, Nov. 16, 1981, 95 Stat. 1074.)

Section 3373. Penalties and sanctions

(a) Civil penalties

(1) Any person who engages in conduct prohibited by any provision of this chapter (other than section 3372(b) of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty, or regulation, may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation: Provided, That when the violation involves fish or wildlife or plants with a market value of less than $350, and involves only the transportation, acquisition, receipt of fish or wildlife or plants taken or possessed in violation of any law, treaty, or regulation of the United States, any Indian tribal law, any foreign law, or any law or regulation of any State, the penalty assessed shall not exceed the maximum provided for violation of said law, treaty, or regulation, or $10,000, whichever is less.

(2) Any person who violates section 3372(b) of this title may be assessed a civil penalty by the Secretary of not more than $250.

(3) For purposes of paragraphs (1) and (2), any reference to a provision of this chapter or to a section of this chapter shall be treated as

including any regulation issued to carry out any such provision or section.

(4) No civil penalty may be assessed under this subsection unless the person accused of the violation is given notice and opportunity for a hearing with respect to the violation. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which a person may have taken or been in possession of the said fish or wildlife or plants.

(5) Any civil penalty assessed under this subsection may be remitted or mitigated by the Secretary.

(6) In determining the amount of any penalty assessed pursuant to paragraphs (1) and (2), the Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited act committed, and with respect to the violator, the degree of culpability, ability to pay, and such other matters as justice may require.

(b) Hearings

Hearings held during proceedings for the assessment of civil penalties shall be conducted in accordance with section 554 of Title 5. The administrative law judge may issue subpenas (sic) for the attendance and testimony of witnesses and the production of relevant papers, books, or documents, and may administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena (sic) issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such

person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(c) Review

Any person against whom a civil penalty is assessed under this section may obtain review thereof in the appropriate district court of the United States by filing a notice of appeal in such court within thirty days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found or such penalty imposed, as provided in section 2112 of Title 28. If any person fails to pay an assessment of a civil penalty after is has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Secretary, the Secretary may request the Attorney General of the United States to institute a civil action in an appropriate district court of the United States to collect the penalty, and such court shall have authority to review and decide any such action. In hearing such action, the court shall have authority to review the violation and the assessment of the civil penalty de novo.

(d) Criminal Penalties

(1) Any person who-

(A) knowingly imports or exports any fish or wildlife or plants in violation of any provision of this chapter (other than section 3372(b) of this title), or

(B) violates any provision of this chapter (other than section 3372(b) of this title) by knowingly engaging in conduct that involves

the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants with a market value in excess of $350,

knowing that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation, shall be fined not more than $20,000, or imprisoned for not more that five years, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

(2) Any person who knowingly engages in conduct prohibited by any provisions of this chapter (other than section 3372(b) of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation shall be fined not more that $10,000, or imprisoned for not more than one year, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

(e) Permit sanctions

The Secretary may also suspend, modify, or cancel any Federal hunting or fishing license, permit, or stamp, or any license or permit authorizing a person to import or export fish or wildlife or plants (other than a permit or license issued pursuant to the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. §1801 et seq.]), or to operate a quarantine station or rescue center for imported wildlife or plants,

issued to any person who is convicted of a criminal violation of any provision of this chapter or any regulation issued hereunder. The Secretary shall not be liable for the payments of any compensation, reimbursement, or damages in connection with the modification, suspension, or revocation of any licenses, permits, stamps, or other agreements pursuant to this section.

(Publ. L. 97-79, §4, Nov. 16, 1981, 95 Stat. 1074.)

16 UNITED STATES CODE ANNOTATED,
Sections 742j-1(a) & (b)

Airborne hunting--Prohibition; penalty

(a) Any person who--

(1) while airborne in an aircraft shoots or attempts to shoot for the purpose of capturing or killing any bird, fish, or other animal; or

(2) uses an aircraft to harass any bird, fish, or other animal; or

(3) knowingly participates in using an aircraft for any purpose referred to in paragraph (1) or (2);

shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Exemption; report of State to Secretary

(b)(1) This section shall not apply to any person if such person is employed by, or is an authorized agent of or is operating under a license or permit of, any State or the United States to administer or protect or aid in the administration or protection of land, water, wildlife, livestock, domesticated animals, human life, or crops, and each such person so operating under a license or permit shall report to the applicable issuing

authority each calendar quarter the number and type of animals so taken.

(2) In any case in which a State, or any agency thereof, issues a permit referred to in paragraph (1) of this subsection, it shall file with the Secretary of the Interior an annual report containing such information as to the Secretary shall prescribe, including but not limited to--

(A) the name and address of each person to whom a permit was issued;

(B) a description of the animals authorized to be taken thereunder, the number of animals authorized to be taken, and a description of the area from which the animals are authorized to be taken;

(C) the number and type of animals taken by such person to whom a permit was issued; and

(D) the reason for issuing the permit.

FEDERAL RULES OF CRIMINAL PROCEDURE, 18 U.S.C.A.

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

FEDERAL RULES OF CRIMINAL PROCEDURE, 18 U.S.C.A.

Rule 29.

(a) Motion before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) Motion after Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

As amended Feb. 28, 1966, eff. July 1, 1966.